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No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARIZONA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," is too vague and amorphous to create an individually enforceable right under 42 U.S.C. § 1983 ("Section 1983") in the complex area of child welfare.

2. Whether children living at home, who are not in foster care, have enforceable rights under Title IV-E of the AAA, which provides reimbursement for "foster care maintenance payments," when the states receive no federal Title IV-E funds to provide services to those children.

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INTEREST OF AMICI CURIAE

Amici are states that, like Illinois, accept federal reimbursement for "foster care maintenance payments" under Title IV-E of the AAA, a federal-state cooperative funding statute.[1] *Amici* also accept federal funds under numerous other spending-clause statutes.

The Seventh Circuit's decision in *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990), which holds that the AAA's vague "reason-

[1]Because this brief is filed on behalf of states by their respective attorneys general, and the District of Columbia by its authorized law officer, its filing does not require consent of respondent or the Court. *See* Sup. Ct. R. 37.5.

able efforts" clause, 42 U.S.C. § 671(a)(15),[2] creates enforceable rights under Section 1983 and extends those rights to children residing at home, for whom the states receive no federal Title IV-E funds, adversely affects all states that accept Title IV-E reimbursement. Moreover, applied to other imprecise spending-clause statutes, the *Artist M.* precedent will impose upon the states a host of new federally-imposed obligations to persons for whom the states receive no federal money, based on statutes so vague that the states could not possibly have known of their specific obligations when they accepted federal funds.

REASONS FOR GRANTING THE WRIT

For more than a decade, the states have been developing and expanding foster care services funded in part through federal reimbursement under Title IV-E of the AAA. In 1980, Congress enacted the AAA as an amendment to the Social Security Act. The cooperative funding statute was designed to create "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). To create those "incentives," Title IV-E provides reimbursement for foster care costs in exchange for adoption of a state plan meeting certain requirements, including establishment of a case planning process and case review system, both clearly defined in the statute. *See* 42 U.S.C. §§ 671(a)(16), 675(1),(5),(6).

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[2]Section 671(a)(15) provides, in pertinent part:

> In order for a State to be eligible for [foster care maintenance] payments under this part, it shall have a plan approved by the Secretary which—
>
> . . .
>
> (15)...provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

Using the analogy suggested by this Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), those precise terms set out the "contract" to which a state is bound when it accepts federal funds.

To those precisely defined procedural mandates, Congress added the "reasonable efforts" requirement of Section 671(a)(15). *See* 42 U.S.C. §§ 671, 672. Nowhere does the statute define "reasonable efforts," however, recognizing instead that what is "reasonable" depends on the unique circumstances of each individual case and, hence, that such determinations should be left to the states. Thus, Title IV-E carefully balances certain specific procedural requirements with a recognition that child welfare decision making is a difficult process, best committed to specialists at the state level with both expertise and knowledge of the unique circumstances of individual cases.

The Seventh Circuit's opinion in this case upsets the careful balance of federal and state interests enacted by Congress in Title IV-E. Because Congress did not define "reasonable efforts," and because the term is too vague and amorphous to be defined by the courts without external guidance, the Seventh Circuit looked to Illinois' own voluntary practices to determine what the AAA requires. *See* App. 11a.[3] That approach leads to the incongruous result that the AAA creates different federal rights in different states, and the possibility that states with more extensive child welfare programs will have more extensive obligations under federal law. By *discouraging* expansion of state child welfare services, such a result flatly contradicts congressional intent to "encourage" improvements in those systems.

Under the Seventh Circuit's opinion, states can no longer ascertain the parameters of their potential liability when they agree to participate in a federal-state cooperative funding program. In-

[3]All "App." citations are to the Appendix to the Petition for a Writ of Certiorari.

deed, the court below holds that, by accepting federal reimbursement for certain *foster care* costs, the states also unwittingly accept liability under Section 1983 to children *not* in foster care, for whom the states receive *no* Title IV-E money. That holding has implications far beyond the circumstances of *Artist M.* and the AAA. *Artist M.* potentially expands states' obligations under all federal-state funding statutes and creates an unacceptable level of uncertainty surrounding the commitment states make when accepting federal funds. *Amici* therefore urge this Court to grant the writ of *certiorari* and to reverse the Seventh Circuit's decision.

I.

BECAUSE THE "REASONABLE EFFORTS" CLAUSE IS VAGUE AND UNDEFINED, THE OPINION BELOW CREATES DIFFERENT FEDERAL RIGHTS FOR DIFFERENT STATES, DISTORTS STATE CHILD WELFARE DECISIONS, AND CREATES A RISK OF INCONSISTENT "RIGHTS"

The opinion below holds that the AAA's vague and amorphous "reasonable efforts" clause creates individually enforceable federal rights. By looking to Illinois' own actions in determining the contours of those rights, the Seventh Circuit's analysis leads to the result that a vague statute may create different federal rights in different states. Similarly, because the statutory language is imprecise and undefined, a finding of enforceability exposes the states to countless lawsuits, based on each plaintiff's notion of "reasonableness," with the risk of inconsistent judgments and expanded federal intervention into individual state child welfare decisions.

Nor are these consequences limited to the AAA or the child welfare area. The Seventh Circuit's analysis serves as a precedent for interpretation of other spending-clause statutes, which will

lead to the creation of a host of novel rights without any showing of congressional intent to do so. The Seventh Circuit's opinion is nothing less than an abandonment of the "contract" theory of federal funding statutes set out in *Pennhurst* and its progeny. The *Artist M.* court's failure to replace that theory with any similar framework results in the transformation of federal-state cooperative funding statutes into empty vessels, to be filled after enactment by creating "rights" based on the facts of individual cases.

A. The Opinion Below Holds That Federal Law Creates Different Federally Enforceable Rights In Different States

The Seventh Circuit's majority reasons that because Congress directed the states to devise a plan to provide reasonable efforts and left the method of delivery up to the states, each state's actions to develop programs and provide services are determinative of that state's liability under the "reasonable efforts" clause. Following this analysis, the court holds that Illinois' decision "to use caseworkers as the means through which these services are provided" creates an enforceable right to have a caseworker assigned within three days. (App. 11a). If Illinois had chosen some additional means, the statute presumably would have created a right to those mechanisms. That holding leads to the anomalous conclusion that a single federal statute creates wholly different rights in different states, and indeed defeats the very purposes for which Congress enacted the AAA.

Child welfare is not based on a single practice model in every state. What one state may consider "reasonable efforts" may be unreasonable in another state due to differences in client population and available resources. Even within a single state, there are distinct variances from region to region depending on such factors as whether the region encompasses an urban area or rural communities. Indeed, as Congress recognized explicitly in Section

671(a)(15), "reasonable efforts" depend on the facts of each individual case.[4]

Because states use different means to provide disparate services, under *Artist M.* they are subject to varying federally enforceable rights under the AAA. That outcome is contrary to this Court's holding in *Pennhurst*, 451 U.S. 1. In *Pennhurst*, this Court held that a federal funding statute creates enforceable rights only if the states know, *ex ante*, what responsibilities they are assuming. *Id.* at 24-25. The notion of rights based on state actions *after* accepting federal funds is flatly inconsistent with the requirement that states be able to ascertain their obligations *before* accepting the "contract."

More important, the Seventh Circuit's analysis discourages change and improvement in state child welfare programs. Under *Artist M.*, a state adopting new child welfare programs will face increased obligations under the AAA, since the state presumably will have determined that the more extensive services are "reasonable." Moreover, much progress in this area is accomplished through pilot programs, testing new approaches with limited populations. If every child in the system may claim a "right" to all such resources, many programs will never see the light of day.

The AAA was intended to create *incentives* for new programs and approaches to child welfare; the Seventh Circuit's decision undermines that goal. In so doing, the opinion below may cause incalculable harm to the abused and neglected children, and their families, served by child welfare agencies throughout the country.

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[4]The House Report on Title IV-E "recognizes that the preventive services requirement would be inappropriate in certain specific circumstances." H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979). Thus, in some cases, "reasonable efforts" equal *no* efforts.

B. The Opinion Below Greatly Expands Federal-Court Intervention Into Individual State Child Welfare Decisions, Distorting Those Decisions And Creating A Risk of Inconsistent "Rights"

The opinion below holds that every child served by a state child welfare agency may sue the state when that child, or the child's advocate, believes that the state's efforts have not been "reasonable." *See* App. 29a (Manion, J., dissenting). Thus, by creating enforceable rights from an undefined and vague statutory term, the Seventh Circuit has held that federal judges may give definition to that language, based on the pleas of individual plaintiffs in isolated cases, thereby creating a powerful and unintended vehicle for expansion of federal rights. In the words of the dissent below, the panel opinion opens the door to an "avalanche" of litigation and turns the federal courts into "crisis administrator[s] of child welfare." (App. 29a-30a (Manion, J., dissenting)).

Nor is that "avalanche" merely a wild-eyed prediction: it has already begun. As discussed in the Petition, many states presently face actions raising "reasonable efforts" claims. *See* Petition at 8-9 (collecting cases). In one such action, *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), the district court, following the district court opinion in *Artist M.*, held that Illinois' efforts to reunite two individual families were not "reasonable," and entered individualized injunctions. In the case of a third plaintiff, the court found the state's efforts "reasonable," but stated that the court might reconsider that ruling if the state did not provide the plaintiff with sufficient beds. *Id.* at 1208 & n.8 (Report and Recommendation of Magistrate adopted by district court). Nothing in the AAA foreshadows such federal judicial micro-management of individual foster-care cases.

One problem with such judicial second-guessing in individual cases is that child abuse does not lend itself to pat solutions. Reasonable minds may differ, and in judicial hindsight it is all too

easy to equate "reasonable efforts" with "successful efforts." That pitfall cannot be avoided when "reasonable efforts" determinations are made by federal judges on the facts of isolated cases.

As Congress recognized in leaving the contours of "reasonable efforts" to the states,[5] child welfare is primarily an area of state concern and expertise. *See, e.g.*, S. Rep. No. 336, 96th Cong., 2d Sess. 1, 16, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1466 (recognizing that states have "primary responsibility" for child welfare). It is an area of complex problems without easy solutions. *See, e.g., DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987) (child welfare decision making "is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts . . . than by the state judicial and administrative authorities"), *aff'd*, 109 S. Ct. 998 (1989).

In enacting Title IV-E, Congress contemplated that *state* juvenile courts would act as the primary check on states' compliance with the "reasonable efforts" requirement. Under Section 672(1) of the AAA, prior to removing a child from the home, the state must obtain a "judicial determination to the effect that continuation therein would be contrary to the welfare of such child *and . . . that reasonable efforts . . . have been made*." 42 U.S.C. § 672(1) (emphasis added). Thus, Congress clearly intended that "reasonable efforts" determinations be made by state juvenile courts, which have extensive experience in the area and a detailed grasp of individual cases.

---

[5]*See, e.g.*, H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) ("The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child."). *Cf.* 45 C.F.R. § 1357.15(e)(2) (listing examples of preventive or reunification services that states "*may*" provide in individual cases).

The opinion below instead thrusts these complex issues before federal judges, setting them up as "super-juvenile courts." As the dissent predicts:

> Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits. Delay and denial will result because standing for injunctive and declaratory relief has now been extended to every plaintiff with a notion of "reasonable efforts" that conflicts with that of the DCFS. The DCFS will most likely experience considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done.

(App. 30a (Manion, J., dissenting)).

By requiring federal judges to determine what constitute "reasonable" child welfare practices in individual cases, the opinion below exposes the states to the risk of numerous federal decisions creating inconsistent obligations. Rather than choosing the appropriate balance of resources, so that the states may serve the most children in the most effective and efficient manner possible, a judge is forced to decide what allocation of resources is "reasonable" based on the facts of one individual's case. Multiplied by dozens of decisions, each based on a limited view of the landscape, the opinion below will result in a distortion of priorities across the child welfare system.

At present, the states are striving to deal effectively with the growing national problem of abused and neglected children. The Seventh Circuit's decision in this case sets that struggle back immeasurably. Because of the court's error in this case, and because that error may soon be compounded in other spending-clause cases, *amici* urge this Court to issue the writ of certiorari.

II.

THE EXTENSION OF ENFORCEABLE RIGHTS TO CHILDREN FOR WHOM THE STATES RECEIVE NO FEDERAL TITLE IV-E FUNDS REMOVES A CRUCIAL LIMITATION ON FEDERAL COURT POWER TO CREATE ENFORCEABLE RIGHTS

The Seventh Circuit's opinion holds that Title IV-E of the AAA creates enforceable rights on behalf of children residing at home, for whom the states receive no federal money under Title IV-E. (App. 18a). With that stroke of the pen, the *Artist M.* court has abolished the most fundamental limitation on the power of courts to create federally enforceable rights from federal-state cooperative funding statutes: Congress creates no rights without federal funding. *See Pennhurst*, 451 U.S. at 24.

The impact on the states of the Seventh Circuit's holding—that federal funding statutes may create rights without providing *any* money to meet those obligations—extends well beyond the area of child welfare and the AAA. The AAA is one of hundreds of federal-state cooperative funding statutes. Under this decision, plaintiffs potentially may sue to enforce "rights" under those statutes whether or not the states receive federal funds with which to serve those plaintiffs. That result contravenes principles of federalism and fairness, and should be reviewed by this Court.

CONCLUSION

For the reasons stated herein and in the Petition, *amici* respectfully urge this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Dated: April 19, 1991

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